

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

United States District Court  
Southern District of Texas  
FII FD

JAN 04 2007

Michael N. Milby, Clerk

OSWALDO ENRIQUE TOBAR,	)	
ROSA CARMELINA ZAMBRANO LUCAS,	)	
JUNIOR IVAN PICO ALAVA,	)	
SEGUNDO MATIAS ZAMBRANO ALONZO,	)	
FRANCISCO GABRIEL YOLE ARTEAGO,	)	
FAUSTO LUPERCIO ARIAS CASTANEDA,	)	
FRABRICIO BAYRON CEDENO,	)	
JOFFRE JOHNNY CEDENO CEDENO,	)	
LINDON CLEOFE CEDENO CEDENO,	)	
RAMON ELIADES RAMON VELEZ CEDENO,	)	
DANIEL DAVID QUIMI CHALEN,	)	
PABLO EDUARDO LUCAS CONFORME,	)	
RAMON EDUARDO PILLIGUA CONFORME,	)	
CIRO MARIANO LOPEZ MERO,	)	
PEDRO MANUEL LOPEZ MERO,	)	NO.
JOSE EDUARDO LUCAS MERO,	)	
LUIS ANTONIO PENAFIEL MERO,	)	
PEDRO JOSE REYES MERO,	)	
TELMO ARCADIO CHICA OBANDO,	)	
LUIS MIGUEL CEDENO PICO,	)	
JAIME GUSTAVO PALMA PINARGOTE,	)	
YARDY KLEVER FLORES SEGOVIA,	)	
PACHO HERNANDEZ SOLORZANO,	)	
CARLOS WILFRIDO VELIZ VELEZ,	)	
CARLOS ORLANDO VELEZ ZAMBRANO,	)	
JOSE LUIS ZAMBRANO, ZAMBRANO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

**PLAINTIFFS' ORIGINAL COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, OSWALDO ENRIQUE TOBAR, ROSA CARMELINA ZAMBRANO LUCAS,  
JUNIOR IVAN PICO ALAVA, SEGUNDO MATIAS ZAMBRANO ALONZO, FRANCISCO  
GABRIEL YOLE ARTEAGO, FAUSTO LUPERCIO ARIAS CASTANEDA, FRABRICIO BAYRON

CEDENO, JOFFRE JOHNNY CEDENO CEDENO, LINDON CLEOFE CEDENO CEDENO, RAMON ELIADES RAMON VELEZ CEDENO, DANIEL DAVID QUIMI CHALEN, PABLO EDUARDO LUCAS CONFORME, RAMON EDUARDO PILLIGUA CONFORME, CIRO MARIANO LOPEZ MERO, PEDRO MANUEL LOPEZ MERO, JOSE EDUARDO LUCAS MERO, LUIS ANTONIO PENAFIEL MERO, PEDRO JOSE REYES MERO, TELMO ARCADIO CHICA OBANDO, LUIS MIGUEL CEDENO PICO, JAIME GUSTAVO PALMA PINARGOTE, YARDY KLEVER FLORES SEGOVIA, PACHO HERNANDEZ SOLORZANO, CARLOS WILFRIDO VELIZ VELEZ, CARLOS ORLANDO VELEZ ZAMBRANO, JOSE LUIS ZAMBRANO, ZAMBRANO, hereinafter called Plaintiffs, complaining of the UNITED STATES OF AMERICA, hereinafter referred to as Defendant, and would respectfully show the Court the following:

**I.**

This action arises in part under the Federal Tort Claims Act, 28 U.S.C., Section 1346(b) and 2661 et. seq. and particularly 28 U.S.C. Section 2680(h), the suits in Admiralty Act 42 U.S.C. §741 et. seq. and the Public Vessels Act, 46 U.S.C. Section 781, et. seq.

**II.**

Plaintiffs reside in the country of Ecuador. The Defendant owns and operates a U.S. Coast Guard and U.S. Navy facility in Galveston, Texas.

**III.**

On or about October 5, 2005 in international waters off the Galapagos Islands in the Pacific Ocean the agents of the Defendant unlawfully and negligently, stopped, searched, arrested, detained and imprisoned the Plaintiffs, seized the boat, destroyed the cargo and fish owned by Plaintiffs ROSA CARMELINA ZAMBRANO LUCAS, and OSWALDO ENRIQUE TOBAR, for allegedly smuggling and possessing illegal drugs.

**IV.**

At all times herein mentioned, the acts of commission or omission of agents of the Defendant were on behalf of the Defendant and were in the course and scope of their employment or agency or such that their actions were intentional as law enforcement officials as defined by 28 U.S.C. Section 2680 (h). The Government agents or employees that were responsible for the damages done to Plaintiffs would be liable just as if they were private persons. No charges were ever subsequently brought against any Plaintiff. Defendant in fact, apologized to the Plaintiffs for the actions of the agents.

**V.**

The agents of the Defendant were careless, reckless and negligent in this case or alternatively their acts were intentional in that they:

1. Arrested and detained the Plaintiffs for no reason for over 99 days.
2. Failed to ascertain that Plaintiffs were not drug dealers and/or smugglers.
3. Arrested the Plaintiffs without probable cause.
4. Falsely imprisoned the Plaintiffs for no reason despite Plaintiffs' protestations.
5. Failed to release the Plaintiffs and their vessel when it became known they were not drug smugglers and did not possess any illegal substances.
6. Violated the Plaintiffs' constitutional rights under the IV, V, VI, VIII, and XIV amendments to the United States Constitution.
7. Violated international law by boarding and seizing a foreign flagged vessel in international waters.
8. Committed various and numerous assaults on Plaintiffs persons during their imprisonment.

9. Wrongfully seized and kept the vessel owned by Plaintiffs ROSA CARMELINA ZAMBRANO LUCAS and OSWALDO ENRIQUE TOBAR.
10. Violated right of privacy of all the Plaintiffs.
11. Destroyed the personal property of the Plaintiffs without probable cause.
12. Held the Plaintiffs as prisoners under armed guard.
13. Violated treaty obligations with Ecuador.

**VI.**

As a direct and proximate result of one or more of the foregoing acts or omissions on the part of the agents of the Defendant, done in the course and scope of their job the Plaintiffs were permanently injured, damaged and infringed upon, all of which will affect them for the remainder of their natural lives.

**VII.**

Further, as a direct and proximate result of said acts of commission or omission on the part of Defendant's agents or employees, the Plaintiffs have suffered the following injuries:

1. All the Plaintiffs were imprisoned in a most hostile environment.
2. All the Plaintiffs have suffered severe humiliation;
3. All the Plaintiffs have suffered physical and mental pain and suffering and will continue to do so in the future;
4. All the Plaintiffs have suffered extreme anxiety and depression and will continue to do so in the future;
5. ROSA CARMELINA ZAMBRANO LUCAS, COMMANDER OSWALDO ENRIQUE TOBAR had their personal property destroyed.
6. They have sustained property damage to the vessel and loss of their catch of fish in the amount of \$500,000.00.

7. They have lost the use of the vessel.

8. They suffered public ridicule.

By reason of all the foregoing, the Plaintiffs have been damaged in the sum of \$5,025,000.00.

**VII.**

On April 18, 2006 Plaintiffs filed a claim for injuries with the United States Navy and Coast Guard. Six months have passed without any action taken by the Defendant on the claim. This is tantamount to denial of the claim.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendant be cited and served to appear and answer herein, and that upon final trial of this cause, Plaintiffs have judgment against the Defendant in the sum of \$5,025,000.00 and for such other and further relief, both general and special, at law and in equity, to which the Plaintiffs are justly entitled.

Respectfully submitted,

**MIRANDA & BOYAKI**

Attorneys at Law  
4621 Pershing Drive  
El Paso, Texas 79903  
Tel.: (915) 566-8688  
Fax : (915) 566-5906

  
**WALTER L. BOYAKI**

Attorney for Plaintiffs  
State Bar No. 02759500

  
**HERIBERTO RAMOS**

Ramos & Associates  
917 Franklin, Suite 300  
Houston, Texas 77002  
State Bar No. 24033102

JS 44  
(Rev. 07/69)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I (a) PLAINTIFFS

JUNIOR IVAN PICO ALAVA, ET AL

## DEFENDANTS

UNITED STATES OF AMERICA

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF EL PASO  
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT  
(IN U.S. PLAINTIFF CASES ONLY)  
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)  
WALTER L. BOYAKI  
4621 PERSHING DR.  
EL PASO, TEXAS 79903

ATTORNEYS (IF KNOWN)

United States District Court  
Southern District of Texas  
FILED  
JAN 04 2007  
Michael N. Milby, Clerk

## II. BASIS OF JURISDICTION

(PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

## IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

DO NOT CITE JURISDICTIONAL STATUTES (UNLESS DIVERSITY)

F.T.C.A., 28 U.S.C., Section 1346b and 2671, et. seq.

## V. NATURE OF SUIT

(PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Motor Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Maritime Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (East, Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans' Benefits <input type="checkbox"/> 160 Shareholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY - Medical Malpractice</b> <input checked="" type="checkbox"/> 362 Personal Injury - Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Abused Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Found <input type="checkbox"/> 371 Torts in Landing <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage (Product Liability)	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Labor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Rights <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Agmt. Relations <input type="checkbox"/> 730 Labor/Agmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Legislation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 630 Copyrights <input type="checkbox"/> 630 Patent <input type="checkbox"/> 640 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 801 HIA (13850) <input type="checkbox"/> 802 Black Lung (923) <input type="checkbox"/> 803 DIWC/DIWW (405(g)) <input type="checkbox"/> 804 Title XVI <input type="checkbox"/> 805 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7006	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Arbitration <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Rochester Indemnity and Current Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motion to Vacate Sentence <input type="checkbox"/> 520 Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Other		

## VI. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

- ☐ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐

DEMAND \$

Check YES only if demanded in complaint:  
JURY DEMAND: ☐ YES ☒ NO

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, )(  
ROSA CARMELINA ZAMBRANO LUCAS, )(  
JUNIOR IVAN PICO ALAVA, )(  
SEGUNDO MATIAS ZAMBRANO ALONZO, )(  
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CARLOS WILFRIDO VELIZ VELEZ, )(  
CARLOS ORLANDO VELEZ ZAMBRANO, )(  
JOSE LUIS ZAMBRANO, ZAMBRANO, )(  
Plaintiffs, )(  
v. )(  
UNITED STATES OF AMERICA, )(  
Defendant. )(

United States District Court  
Southern District of Texas  
FILED

JAN 4 2007

Michael N. Milby, Clerk

NO.

**PLAINTIFFS' MOTION FOR ADMISSION PRO HAC VICE**  
**OF WALTER L. BOYAKI**

Plaintiffs OSWALDO ENRIQUE TOBAR, ROSA CARMELINA ZAMBRANO LUCAS,  
JUNIOR IVAN PICO ALAVA, SEGUNDO MATIAS ZAMBRANO ALONZO, FRANCISCO  
GABRIEL YOLE ARTEAGO, FAUSTO LUPERCIO ARIAS CASTANEDA, FRABRICIO BAYRON

CEDENO, JOFFRE JOHNNY CEDENO CEDENO, LINDON CLEOFE CEDENO CEDENO,  
RAMON ELIADES RAMON VELEZ CEDENO, DANIEL DAVID QUIMI CHALEN, PABLO  
EDUARDO LUCAS CONFORME, RAMON EDUARDO PILLIGUA CONFORME, CIRO  
MARIANO LOPEZ MERO, PEDRO MANUEL LOPEZ MERO, JOSE EDUARDO LUCAS MERO,  
LUIS ANTONIO PENAFIEL MERO, PEDRO JOSE REYES MERO, TELMO ARCADIO CHICA  
OBANDO, LUIS MIGUEL CEDENO PICO, JAIME GUSTAVO PALMA PINARGOTE, YARDY  
KLEVER FLORES SEGOVIA, PACHO HERNANDEZ SOLORZANO, CARLOS WILFRIDO  
VELIZ VELEZ, CARLOS ORLANDO VELEZ ZAMBRANO, JOSE LUIS ZAMBRANO,  
ZAMBRANO, by their attorney, hereby moves the Court for an Order granting leave for WALTER L.  
BOYAKI to appear pro hac vice as counsel for Plaintiffs in this action. In support of this motion,  
Plaintiffs rely on the attached Affidavit of WALTER L. BOYAKI.

**WHEREFORE**, Plaintiffs respectfully request that this Motion be granted.

Respectfully submitted,

**MIRANDA & BOYAKI**

Attorneys at Law  
4621 Pershing Drive  
El Paso, Texas 79903  
Tel.: (915) 566-8688  
Fax : (915) 566-5906

By:

  
**WALTER L. BOYAKI**

Attorney for Plaintiffs  
State Bar No. 02759500



**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR,	)	
ROSA CARMELINA ZAMBRANO LUCAS,	)	
JUNIOR IVAN PICO ALAVA,	)	
SEGUNDO MATIAS ZAMBRANO ALONZO,	)	
FRANCISCO GABRIEL YOLE ARTEAGO,	)	
FAUSTO LUPERCIO ARIAS CASTANEDA,	)	
FRABRICIO BAYRON CEDENO,	)	
JOFFRE JOHNNY CEDENO CEDENO,	)	
LINDON CLEOFE CEDENO CEDENO,	)	
RAMON ELIADES RAMON VELEZ CEDENO,	)	
DANIEL DAVID QUIMI CHALEN,	)	
PABLO EDUARDO LUCAS CONFORME,	)	
RAMON EDUARDO PILLIGUA CONFORME,	)	
CIRO MARIANO LOPEZ MERO,	)	
PEDRO MANUEL LOPEZ MERO,	)	NO.
JOSE EDUARDO LUCAS MERO,	)	
LUIS ANTONIO PENAFIEL MERO,	)	
PEDRO JOSE REYES MERO,	)	
TELMO ARCADIO CHICA OBANDO,	)	
LUIS MIGUEL CEDENO PICO,	)	
JAIME GUSTAVO PALMA PINARGOTE,	)	
YARDY KLEVER FLORES SEGOVIA,	)	
PACHO HERNANDEZ SOLORZANO,	)	
CARLOS WILFRIDO VELIZ VELEZ,	)	
CARLOS ORLANDO VELEZ ZAMBRANO,	)	
JOSE LUIS ZAMBRANO, ZAMBRANO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

**AFFIDAVIT OF WALTER L. BOYAKI**

STATE OF TEXAS           )  
                                  )  
COUNTY OF EL PASO       )

**BEFORE ME, the undersigned authority, on this day personally appeared WALTER L.**

BOYAKI, who after being by me first duly sworn, on his oath states the following:

"My name is Walter L. Boyaki. I am a partner with the law firm of MIRANDA & BOYAKI, 4621 Pershing Drive, El Paso, Texas, 79903.

"I am a member in good standing of the State Bar of Texas and am admitted to practice before the United States District Courts for the Western Districts of Texas, and the Fifth Circuit Court of Appeals.

"Plaintiffs have requested Walter L. Boyaki to represent them in this case and have retained our firm to do so. I am fully familiar with the facts in this matter.

"I am aware that my admission to practice pro hac vice in this Court, if granted, requires that I observe all rules of the Court, and I pledge to do so.

"I declare under penalty of perjury that the foregoing is true and correct."

  
WALTER L. BOYAKI

SUBSCRIBED AND SWORN TO BEFORE ME by the said Walter L. Boyaki this 29 day of December, 2006.



  
Notary Public in and for the  
State of Texas

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR,	)	
ROSA CARMELINA ZAMBRANO LUCAS,	)	
JUNIOR IVAN PICO ALAVA,	)	
SEGUNDO MATIAS ZAMBRANO ALONZO,	)	
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FAUSTO LUPERCIO ARIAS CASTANEDA,	)	
FRABRICIO BAYRON CEDENO,	)	
JOFFRE JOHNNY CEDENO CEDENO,	)	
LINDON CLEOFE CEDENO CEDENO,	)	
RAMON ELIADES RAMON VELEZ CEDENO,	)	
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CIRO MARIANO LOPEZ MERO,	)	
PEDRO MANUEL LOPEZ MERO,	)	NO.
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PEDRO JOSE REYES MERO,	)	
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PACHO HERNANDEZ SOLORZANO,	)	
CARLOS WILFRIDO VELIZ VELEZ,	)	
CARLOS ORLANDO VELEZ ZAMBRANO,	)	
JOSE LUIS ZAMBRANO, ZAMBRANO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

**ORDER**

On \_\_\_\_\_ day of \_\_\_\_\_, 2006, came on to be considered the Motion of  
Plaintiffs OSWALDO ENRIQUE TOBAR, ROSA CARMELINA ZAMBRANO LUCAS,  
JUNIOR IVAN PICO ALAVA, SEGUNDO MATIAS ZAMBRANO ALONZO, FRANCISCO  
GABRIEL YOLE ARTEAGO, FAUSTO LUPERCIO ARIAS CASTANEDA, FRABRICIO BAYRON

CEDENO, JOFFRE JOHNNY CEDENO CEDENO, LINDON CLEOFE CEDENO CEDENO,  
RAMON ELIADES RAMON VELEZ CEDENO, DANIEL DAVID QUIMI CHALEN, PABLO  
EDUARDO LUCAS CONFORME, RAMON EDUARDO PILLIGUA CONFORME, CIRO  
MARIANO LOPEZ MERO, PEDRO MANUEL LOPEZ MERO, JOSE EDUARDO LUCAS MERO,  
LUIS ANTONIO PENAFIEL MERO, PEDRO JOSE REYES MERO, TELMO ARCADIO CHICA  
OBANDO, LUIS MIGUEL CEDENO PICO, JAIME GUSTAVO PALMA PINARGOTE, YARDY  
KLEVER FLORES SEGOVIA, PACHO HERNANDEZ SOLORZANO, CARLOS WILFRIDO  
VELIZ VELEZ, CARLOS ORLANDO VELEZ ZAMBRANO, JOSE LUIS ZAMBRANO,  
ZAMBRANO for admission pro hac vice of WALTER L. BOYAKI, and the Court finds good ground  
for the Motion.

IT IS, THEREFORE, ORDERED AND DECREED that the Motion is GRANTED.  
WALTER L. BOYAKI is hereby admitted to practice before this Court pro hac vice for Plaintiffs  
subject to his continuing compliance with the rules of this Court.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
JUDGE PRESIDING

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

**CIVIL ACTION NUMBER 3:07-cv-00003  
Tobar et al v. United States of America**

**ORDER FOR CONFERENCE  
AND  
DISCLOSURE OF INTERESTED PARTIES**

1. Counsel shall appear for an initial pretrial and scheduling conference before

**HONORABLE SAMUEL B. KENT  
on April 4, 2007, at 09:20 AM  
Sixth Floor Courtroom  
U. S. Post Office Building  
601 Rosenberg  
Galveston, Texas 77550**

2. Counsel shall file with the clerk within fifteen days from receipt of this order a certificate listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other legal entities that are financially interested in the outcome of this litigation. If a group can be specified by a general description, individual listing is not necessary. Underline the name of each corporation whose securities are publicly traded. If new parties are added or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, then each counsel shall promptly file an amended certificate with the clerk.
3. Fed. R. Civ. P. Rule 4(m) requires defendant(s) to be served within 120 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 120 days after the filing of the complaint may result in dismissal of this action by the court on its own initiative.
4. After the parties meet as required by Fed. R. Civ. P. Rule 26(f), counsel shall prepare and file not less than ten days before the conference a joint report of the meeting and joint discovery/case management plan containing the information required on the form available on the Southern District of Texas website at <http://www.txs.uscourts.gov>.
5. The court will enter a scheduling order and may rule on any pending motions at the conference.
6. Counsel who file or remove an action must serve a copy of this order with the summons and complaint or with the notice of removal.
7. Attendance by an attorney who has authority to bind the party is required at the conference.
8. Counsel shall discuss with their clients and each other whether alternative dispute resolution is appropriate and at the conference shall advise the court of the results of their discussions.
9. A person litigating pro se is bound by the requirements imposed upon counsel in this order.
10. Failure to comply with this order may result in sanctions, including dismissal of the action and assessment of fees and costs.

By Order of the Court

---

**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF TEXAS**

---

**Notice of the Right to Try  
a Civil Case Before a Magistrate Judge**

With the consent of all the parties, a United States Magistrate Judge may preside in a civil case, including jury trial and final judgment.

The choice of trial before a magistrate judge is entirely yours. Tell only the clerk. Neither the judge or magistrate judge will be told until all the parties agree.

The district judge to whom your case is assigned must approve the referral to a magistrate judge.

You may get consent forms from the clerk.

Michael N. Milby, Clerk

---

**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF TEXAS**

---

Oswaldo Enrique Tobar, et al.  
Plaintiff/Petitioner

*versus*

United States of America  
Defendant/Respondent(s)

§  
§  
§  
§  
§

Case Number: 3:07-cv-00003

### **Consent to Proceed Before a Magistrate Judge**

All parties to this case waive their right to proceed before a district judge and consent to have a United States Magistrate Judge conduct all further proceedings, including the trial and judgment. 28 U.S.C. § 636(c). Appeal directly to the Fifth Circuit.

---

### **Order to Transfer**

This case is transferred to United States Magistrate Judge

John R. Froeschner

to conduct all further proceedings, including final judgment.

---

Date

---

United States District Judge

United States Courts  
Southern District of Texas  
ENTERED

JAN 05 2007

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

Michael N. Milby, Clerk of Court

IN THE MATTER OF COMPUTER CODES	§	GENERAL GALVESTON DIVISION
PRINTED ON PROPOSED	§	SPECIAL ORDER NO. 2007-1
ORDERS SUBMITTED TO THIS COURT	§	(Application limited to this Division only)

**ORDER G 07-003**

Pursuant to Special Order 2006-1 issued January 13, 2006, the Court continues to note a frustrating tendency of counsel's inclusion of computer codes on proposed orders submitted for the signature of this Court. In the infancy of this problem, such codes were usually four or five digit numbers obscurely put on the lower left or right portion of such proposed orders. These were innocuous, and did not constitute much of a problem. However, as computers have grown in sophistication, so have these codes. Now, the court is frequently confronted with proposed orders upon which are printed long and substantially cryptic references, often including several lines, and measuring as much as three or four inches of text. Inasmuch as these have nothing to do with the substance of the order, and are confusing to lay people not familiar with computer formats, particularly such as *pro se* litigants and the like, this practice will not longer be tolerated in this Court. Henceforth, it is accordingly

**ORDERED, ADJUDGED and DECREED** that any proposed order bearing any computer codes of any kind or description will be stricken. The Court will follow this practice through the close of business on December 31, 2007. Thereafter, any proposed order submitted with such inappropriate computer references will be subject to sanctions.

**DONE** at Galveston, Texas this the 5<sup>th</sup> day of January, 2007.

  
SAMUEL B. KENT  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, *et al.*

V.

UNITED STATES OF AMERICA

§  
§  
§  
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§  
§

CIVIL ACTION NO. G-07-003

**ORDER STRIKING PLEADING**

The Clerk has filed Plaintiffs' Motion for Admission Pro Hac Vice [Doc. # 2], however, it is deficient in the area(s) checked below:

(NOTE: "L.R." refers to the Local Rules, Southern District of Texas)

1. ☐ Pleading is not signed. (L.R.11.3)
2. ☐ Pleading is not in compliance with L.R.11.3.A (1) through (6).
3. ☐ Caption of the pleading is incomplete. (L.R.10.1)
4. ☐ No certificate of service, or explanation why service is not required. (L.R.5.3)
5. ☒ Motions are not in compliance with L.R.7:
  - a. ☒ No statement of opposition or non-opposition. (L.R.7.2)
  - b. ☒ No statement re conference w/opposing counsel. (L.R.7.1.D)
  - c. ☒ Separate proposed order ~~has incorrect year~~. (L.R.7.1.C)
6. ☐ Motion to consolidate is not in compliance with L.R.7.6.
7. ☒ Other: Case No. not shown in caption; PLEASE USE "*et al.*" instead of listing every Plaintiff's name, IN BOTH CAPTION AND TEXT.
  - a. ☐ Red vertical lines on pleading. (L.R.11.4)
  - b. ☐ Computer codes on proposed order (Galveston General Order 2004-1).
  - c. ☐ No space provided for date on proposed order.
  - d. ☐ No leave of court.

The Clerk is hereby ORDERED to strike the above instrument from the record and notify counsel of such action.

Dated: 1/10/07

  
SAMUEL B. KENT  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

United States District Court  
Southern District of Texas  
FILED

JAN 16 2007

OSWALDO ENRIQUE TOBAR, ET AL.

**Plaintiffs,**

**V.**

**UNITED STATES OF AMERICA.**

**Defendant.**

**Michael N. Milby, Clerk**

NO. 3:07-CV-00003

## **CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following have a financial interest in the outcome of this case:

1. Oswaldo Enrique Tobar,
2. Rosa Carmelina Zambrano Lucas
3. Junior Ivan Pico Alava
4. Segundo Matias Zambrano Alonzo
5. Francisco Gabriel Yole Arteago
6. Fausto Lupercio Arias Castaneda
7. Frabricio Bayron Cedeno
8. Joffre Johnny Cedeno Cedeno
9. Lindon Cleofe Cedeno Cedeno
10. Ramon Eliades Ramon Velez Cedeno
11. Daniel David Quimi Chalen
12. Pablo Eduardo Lucas Conforme
13. Ramon Eduardo Pilligua Conforme
14. Ciro Mariano Lopez Mero
15. Pedro Manuel Lopez Mero
16. Jose Eduardo Lucas Mero
17. Luis Antonio Penafiel Mero
18. Pedro Jose Reyes Mero
19. Telmo Arcadio Chica Obando
20. Luis Miguel Cedeno Pico
21. Jaime Gustavo Palma Pinargote
22. Yardy Klever Flores Segovia
23. Pachó Hernandez Solorzano
24. Carlos Wilfrido Veliz Velez
25. Carlos Orlando Velez Zambrano
26. Jose Luis Zambrano, Zambrano

- 27. Walter L. Boyaki
- 28. Heriberto Ramos
- 29. The United States of America
- 30. The United States Attorneys Office for the Southern District of Texas

Respectfully submitted,

**MIRANDA & BOYAKI**

Attorneys at Law

4621 Pershing Drive

El Paso, Texas 79903

Tel.: (915) 566-8688

Fax : (915) 566-5906

By: /s/ Walter L. Boyaki

**WALTER L. BOYAKI**

Attorney for Plaintiff

State Bar No. 02759500

/s/ Heriberto Ramos

**HERIBERTO RAMOS**

Ramos & Associates

917 Franklin, Suite 300

Houston, Texas 77002

State Bar No. 24033102

**CERTIFICATE OF SERVICE**

I, **WALTER L. BOYAKI**, do hereby certify that a true and correct copy of the foregoing instrument was forwarded to **DANIEL DAVID HU**, P.O. Box 61129, Houston, Texas 77208, on this 9<sup>th</sup> day of January, 2007.

/s/ Walter L. Boyaki

**WALTER L. BOYAKI**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**ANSWER OF DEFENDANT UNITED STATES OF AMERICA**

COMES NOW, Defendant United States of America, by and through the undersigned counsel, and respectfully submits this Answer of Defendant United States of America to the Complaint of Oswaldo Enrique Tobar, et al.

1. Paragraph I does not contain allegations to which any answer is required by the United States of America; to the extent that admissions, denials, or denials for lack of knowledge and information would be required of the United States of America, the allegations are denied, except it is admitted that this is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and that this Court has subject matter jurisdiction of Plaintiff's Complaint and action against Defendant, United States of America, a sovereign nation, if at all, solely under the provisions of the Public Vessels Act, 46 U.S.C. §§ 31101 *et. seq.*, and not otherwise.

2. Paragraph II does not contain allegations to which any answer is required by the United States of America; to the extent that admissions, denials, or denials for lack of

knowledge and information would be required of the United States of America, the allegations are denied for lack of knowledge and information. The United States admits that the United States Coast Guard operates facilities in Galveston, Texas.

3. The allegations in Paragraph III are denied.

4. Paragraph IV does not contain allegations to which any answer is required by the United States of America; to the extent that admissions, denials, or denials for lack of knowledge and information would be required of the United States of America, the allegations are denied.

5. The allegations in Paragraph V are denied

6. The allegations in Paragraph VI are denied.

7. The allegations in Paragraph VII are denied.

8. The second numbered Paragraph VII does not contain allegations to which any answer is required by the United States of America; to the extent that admissions, denials, or denials for lack of knowledge and information would be required of the United States of America, the allegations are denied.

#### FIRST DEFENSE

9. This Court lacks subject matter jurisdiction as to the claims against the United States of America.

#### SECOND DEFENSE

10. The Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

### THIRD DEFENSE

11. If Plaintiffs sustained injuries and damages by reason of the matters alleged in the Complaint, which are denied, then said injuries and damages were caused in whole or in part by Plaintiffs' own negligence and fault, and were not caused in any manner by any fault or negligence of the United States of America, its officers, agents, servants, employees or others for whom it was responsible.

### FOURTH DEFENSE

12. If Plaintiffs sustained injuries and damages by reason of the matters alleged in the Complaint, which are denied, then said injuries and damages were caused in whole or in part by the acts of third parties, and were not caused or contributed to in any manner by any fault or negligence of the United States of America, its officers, agents, servants, employees or others for whom it was responsible.

### FIFTH DEFENSE

13. This Court lacks subject matter jurisdiction over Plaintiffs' action against the United States of America in that Plaintiffs' Complaint alleges damages resulting from the exercise or performance of, or the failure to exercise or perform, discretionary or governmental functions by federal agencies, officers, agents, servants, employees or others for whom the United States of America was or is responsible, for which actions or failures the United States of America cannot be held liable.

### SIXTH DEFENSE

14. Venue in this Court is improper.

**SEVENTH DEFENSE**

15. This Court lacks jurisdiction of the subject matter of Plaintiffs' complaint and action against the United States of America in that it claims injuries or damages resulting from law enforcement activities of the United States for which the United States of America is not liable as a matter of substantive law.

WHEREFORE, Defendant United States of America prays as follows:

1. That judgment be entered dismissing Plaintiff's action.
2. That the United States of America be awarded costs.
3. That the United States of America may have such other and further relief as this Court may deem just and proper.

Dated: March 2, 2007.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.  
United States Attorney

DANIEL HU  
Assistant United States Attorney

STEPHEN CAMPBELL  
Trial Attorney  
Torts Branch, Civil Division

s/ JOHN S. LUCE Jr.  
JOHN S. LUCE Jr.

Attorney In Charge  
New York Bar # 3934213  
Trial Attorney  
Torts Branch, Civil Division  
U. S. Department of Justice  
P.O. Box 14271  
Washington, D.C. 20044-4271  
Telephone: (202) 616-4035  
Facsimile: (202) 616-4159  
E-Mail: john.luce@usdoj.gov



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 2, 2007, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to the following:

Walter L. Boyaki.

I further certify that I mailed the foregoing document and notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Heriberto Ramos  
Ramos & Associates  
917 Franklin , Suite 300  
Houston, Texas 77002

s/ JOHN S. LUCE Jr.  
JOHN S. LUCE Jr.  
Attorney In Charge  
New York Bar # 3934213  
Trial Attorney  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

y.

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

## UNITED STATES' MOTION TO TRANSFER VENUE

The United States of America moves this court to transfer venue pursuant to Federal Rules of Civil Procedure 12(b)(3) and the venue requirements of the Public Vessels Act, 46 U.S.C. § 31104. The Public Vessels Act requires: “A civil action under this chapter shall be brought in the district court of the United States for the district in which the vessel or cargo is found within the United States.” 46 U.S.C. § 31104(a). Transfer is warranted as a matter of law because the public vessel in issue – USS MCCLUSKY – was in her homeport of San Diego, California on the date the complaint was filed.

Dated: March 2, 2007

Respectfully submitted,

**PETER D. KEISLER**  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.  
United States Attorney

DANIEL HU  
Assistant United States Attorney

STEPHEN CAMPBELL  
Trial Attorney  
Torts Branch, Civil Division

s/ JOHN S. LUCE Jr.  
JOHN S. LUCE Jr.  
Attorney In Charge  
New York Bar # 3934213  
Trial Attorney  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendant

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Civil Action G-07-003

**MEMORANDUM IN SUPPORT OF THE  
UNITED STATES' MOTION TO TRANSFER VENUE**

**PRELIMINARY STATEMENT**

This memorandum is submitted in support of the United States' motion to transfer the case to the Southern District of California. In accordance with Local Rule LR7.1, the parties have conferred and counsel can not agree about the disposition of the motion.

Plaintiffs designated this action as having been brought against the United States of America under the authority of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 *et. seq.*, the Suits in Admiralty Act ("SAA"), 46 U.S.C. §§ 30901, *et. seq.*, and the Public Vessels Act ("PVA"), 46 U.S.C. §§ 31101, *et. seq.* Since Plaintiffs allege an improper boarding and seizure by a United States Navy vessel on the high seas this action comes within the exclusive admiralty jurisdiction of this Court, and must be brought against the United States in conformity with the mandatory venue requirements

of the PVA, which requires that this matter be transferred to the Southern District of California for adjudication.

### **STATEMENT OF FACTS**

Plaintiffs' complaint alleges that on or about October 5, 2005, in international waters off the Galapagos Islands agents of the United States conducted a boarding of a fishing vessel in an unlawful and negligent manner. The boarding was conducted by a U.S. Coast Guard Law Enforcement Detachment operating from the USS MCCLUSKY (FFG 41).

Plaintiffs' complaint does not contain an allegation regarding the location of the USS MCCLUSKY at the time the complaint was filed. The only venue related allegation in Plaintiffs' Complaint is that "Plaintiffs reside in the country of Ecuador." (Compl. ¶ II.) The USS MCCLUSKY's home port is San Diego, California. (LCDR Brown Decl. ¶ 2.) Plaintiff filed this action on January 4, 2007. On January 4, 2007 the USS MCCLUSKY was physically located in its homeport of San Diego, California. (LCDR Brown Decl. ¶ 2; LCDR Brown Decl. Ex A.)

### **DISCUSSION**

**I. Plaintiffs' Action Lies In Admiralty And Involves A Public Vessel; As Such Compliance With The Venue Provisions Of The Public Vessels Act Are Mandatory**

Plaintiffs' complaint concerns law enforcement actions of the United States on international waters involving a public vessel of the United States. As such, the gravamen of plaintiff's complaint arises under the admiralty jurisdiction of this Court.

*See Coumou v. United States*, 107 F. 3d 290, 294 - 95 (5th Cir. 1997) *withdrawn and replaced in part on reh'g*, 114 F 3d 64 (5th Cir. 1997) (applying *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) to a Coast Guard law enforcement actions in international waters involving the master of a vessel engaged in maritime commerce). Plaintiff alleges jurisdiction under the FTCA, SAA, and PVA. The availability of a maritime remedy specifically excludes a remedy under the FTCA. 28 U.S.C. § 2680(d); *Coumou*, 107 F. 3d at 294 n.8.

Plaintiffs' alleged injuries and damages were caused by a public vessel within the meaning of the PVA, wherein it provides that an action in admiralty may be brought against the United States for "(1) damages caused by a public vessel of the United States . . . ." 46 U.S.C. § 31102(a); *see Canadian Aviator, LTD. v. United States*, 324 U.S. 215 (1941). The PVA provides the sole basis for the plaintiff to bring this action. *United States v. United Cont'l Tuna*, 425 U.S. 164 (1976); *Coumou*, 107 F. 3d at 294 - 95. While certain provisions of the SAA are incorporated by reference into the PVA -- to the extent those provisions are not inconsistent with the PVA's terms -- a plaintiff cannot evade the more restrictive terms of the PVA by also suing under the SIAA. *See United Cont'l Tuna*, 425 U.S. at 169; *Adams v. United States*, 64 F. Supp. 2d 647 (S.D. Tex. 1999); *Pascua v. Astrocielo Neptunea Armandora, S.A.*, 614 F. Supp. 984, 985 (S.D. Tex. 1985).

**II. The PVA's Venue Provision Requires That This Action Be Transferred to the Southern District of California**

The United States may only be sued in strict conformity with the conditions by which it has waived its sovereign immunity from suit. *United States v. Sherwood*, 312 U.S. 584, 586-587 (1941); *Soriano v. United States*, 352 U.S. 270 (1957). Like other statutes governing claims against the United States, the PVA is a limited waiver of the sovereign's immunity. In the PVA "Congress has seen fit to establish some limitations as to *where* the Government is subject to suit." *Martin v. United States*, 323 F. Supp. 1131, 1133 (E.D. Pa. 1970) (emphasis added). Section 31104(a) of the PVA provides that "[a] civil action under this chapter shall be brought in the district court of the United States for the district in which the vessel or cargo is found within the United States." A public vessel is "found" by being physically present in the district at the time of filing the complaint. *Sherman v. United States*, 246 F. Supp. 547, 548 (W.D. Mich. 1965); *Simonowycz v. United States*, 125 F. Supp. 847 (N.D. Ohio 1954).

Only if a vessel is not within the territorial waters of the United States is a plaintiff able to bring the action in the district in which he or she resides or if no plaintiff resides in the United States then in the district court for any district. 46 U.S.C. § 31104(b). The venue provisions in the PVA are not equal options for these plaintiffs; to the contrary, they are mutually exclusive venue alternatives. *Chase v. United States*, 1969 A.M.C 1433, 1435 (E.D. Pa. 1969) (not otherwise reported.)

In the present action, the venue provision in the PVA applies and as the subject vessel was physically located in the Southern District of California when Plaintiffs filed



their complaint on January 4, 2007, venue is proper only in that District. Plaintiffs,

therefore, were required to file this action in the Southern District of California. Having failed to do so, the action must be transferred to the Southern District of California. *See Asociacion de Pescadores de Vieques, Inc. v. United States*, 497 F. Supp. 54 (D.P.R. 1979); *Gaines v. United States*, 2004 A.M.C. 2177, 2004 WL 3007091 (D. MD. 2004); *Sneed v. United States*, 1980 A.M.C. 1685 (N.D. Cal. 1980) (not otherwise reported).

### **CONCLUSION**

For the foregoing reasons, the United States' motion to transfer venue should be granted.

Dated: March 2, 2007

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.  
United States Attorney

DANIEL HU  
Assistant United States Attorney

STEPHEN CAMPBELL  
Trial Attorney  
Torts Branch, Civil Division

s/ JOHN S. LUCE Jr.  
JOHN S. LUCE Jr.  
Attorney In Charge

New York Bar # 3934213  
Trial Attorney  
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**CERTIFICATE OF SERVICE**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

 $\gamma$ 

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**AFFIDAVIT OF JAMES E. BROWN**

I, James E. Brown, make the following statement under oath:

1. I am a Lieutenant Commander in the United States Navy and am the Executive Officer of the USS MCCLUSKY (FFG 41).
2. The USS MCCLUSKY was in her homeport of San Diego California on January 4, 2007. A true and accurate copy of the Ship's Log for January 4, 2007 is attached hereto as Exhibit A.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2007.

*[Signature]*

**JAMES E. BROWN**  
Lieutenant Commander  
United States Navy  
Executive Officer, USS MCCLUSKY (FFG 41)

# SHIP'S DECK LOG SHEET

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SECURITY MARKING HERE

USE BLACK INK TO FILL IN THIS LOG

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					LINES DOWNED FORE AND AFT. ENGINEERING PLANT IS
					AS FOLLOWS: #1 HPAC, #1 LPAC, #3 AC, #4 SSB
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					CDO IS (TIG) ROLFS, CDD OS (SW) POLLARD.
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0145					WATCH PROPERLY RELIEVED BY <del>SKZ EMMINGTON</del>
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0810					CO ARRIVED
1143					WATCH PROPERLY RELIEVED BY ENS HURBAN
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1310					CMC DEPARTS
1330					CO DEPARTS
1645					WATCH PROPERLY RELIEVED BY NC (SW) BILLY
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SHIP'S DECK LOG SHEET 38 of 99

USS McCluskey  
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\*U.S. GPO: 2005-704-001/20021

IF CLASSIFIED STAMP  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA

**Defendant.**

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) Civil Action G-07-003

## ORDER GRANTING DEFENDANT UNITED STATES' MOTION TO TRANSFER VENUE

CAME ON TO BE CONSIDERED the United States' Motion to transfer venue under Fed. R. Civ. P. 12(b)(3) and 46 U.S.C. § 31104 (venue requirements of the Public Vessels Act). After reviewing said motion and for the reasons stated therein, it is hereby:

ORDERED that said motion is GRANTED and the case is transferred to the Southern District of California.

DONE and ORDERED in chambers in Galveston, Texas this \_\_\_\_ day of \_\_\_\_\_,  
2007.

**Samuel B. Kent**  
**United States District Judge**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al.,

Plaintiffs,

**v.**

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**DEFENDANT UNITED STATES OF AMERICA**  
**CERTIFICATE OF INTERESTED PARTIES**

COMES NOW, Defendant United States of America, by and through the undersigned counsel, and respectfully submits that the United States of America is financially interested in the outcome of this litigation.

Dated: March 9, 2007.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.  
United States Attorney

DANIEL HU  
Assistant United States Attorney

STEPHEN CAMPBELL  
Trial Attorney  
Torts Branch, Civil Division



s/ JOHN S. LUCE Jr.

JOHN S. LUCE Jr.

Attorney In Charge

New York Bar # 3934213

Trial Attorney

Torts Branch, Civil Division

U. S. Department of Justice

P.O. Box 14271

Washington, D.C. 20044-4271

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Facsimile: (202) 616-4159

E-Mail: john.luce@usdoj.gov

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 9, 2007, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to the following:

Walter L. Boyaki.

I further certify that I mailed the foregoing document and notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Heriberto Ramos  
Ramos & Associates  
917 Franklin , Suite 300  
Houston, Texas 77002

s/ JOHN S. LUCE Jr.

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**PLAINTIFFS' OPPOSITION TO DEFENDANT U.S.A.'S**  
**MOTION TO TRANSFER VENUE**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiffs and file this their opposition to the Defendant's Motion to Transfer Venue and would show the court the following:

**FACTS**

1. This is an action brought by owners and crew members of an Ecuadorian fishing vessel for false arrest, false imprisonment, and destruction of property against agents of the United States working for the U.S. Coast Guard and U.S. Navy who illegally boarded and searched their fishing vessel.
2. The action occurred in international waters off the coast of Ecuador.
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### ARGUMENT

While the United States is correct to cite 46 U.S.C. §31104 for venue purposes under the Public Vessels Act, it is not correct that the case should be transferred to San Diego, California for the following reasons:

#### **I.**

#### **EQUITABLE ESTOPPEL AND JUDICIAL ESTOPPEL**

The actions of agents for the U.S.A. preclude the Defendant from moving for a change of venue.

The Plaintiffs had no choice but to rely on the actions of the Defendant and its agents. The Plaintiffs easily could have waited for the U.S.S. McClusky to leave port before filing their lawsuit, which is incidently the only basis for the change of venue motion. "Litigating Reliance" has long been a recognized principle of equitable estoppel. Reliance may be found in preparing for trial. See Davis v. Wakelee, 156 U.S. 680, 15 S.Ct. 555, 39 L.Ed 578 (1895).

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injury to the opposing party as here with the denial of information on the whereabouts of their vessel.

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This court should disregard the assertion that the Defendant's ship was in port for venue purposes and the Defendant should be estopped from asserting that position.

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Since all the Plaintiffs are Ecuadorian Nationals, they chose a court which was easiest for them to get to. Plaintiffs filed this action on purpose in Galveston, Texas for their convenience since Houston, Texas is the easiest place to get to in the United States.

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The Defendant moving for transfer must show that the original forum is inconvenient for it and that the Plaintiffs would not be substantially inconvenienced by a transfer. Standard Office Systems of Fort Smith, Inc., v. Ricoh Corp., 742 F. Supp. 534, 539 (D.C. Ark. 1990). The airline schedule alone is substantial inconvenience.

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Since this is a tort case, expert witnesses are required. They are difficult and expensive to obtain for Plaintiffs in any case. In this case none of Plaintiffs' witnesses, experts or otherwise are in California. It is more convenient for the experts to come to trial in Galveston, Texas especially those which reside close by. The courts recognize that in certain cases expert witnesses you can trust are extremely difficult to find and this is a consideration. Lykes Bros. S.S.Co. v. Sugarman, 272 F. 2d 679, 681 (2<sup>nd</sup> Cir. 1959); American General Fire & Cas. v. Wal-Mart Stores, Inc., 791 F. Supp. 763 (D.C. Ark. 1992).

(4) Convenience of Witnesses.

This is obviously the most important issue. See Elliott v. Carnival Cruise Lines, Supra at 562 and Gundle Lining Construction Corp. v. Firemans Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994).

It is apparent that most of the locations of most of the defense fact witnesses are unknown. (See Exhibit "B"). Since the defense fact witnesses were all in the U.S. Navy or

U.S. Coast Guard, they will at this time be scattered all over the country.

Since there will be witnesses at least in Ecuador, Texas, California, and elsewhere, no particular place is more convenient. Rather, this case is like Continental Airlines, Inc. v. American Airlines, Inc., 805 F. Supp. 1392, 1397 (D.C. Tex. 1992). There are equally convenient forums.

From the Plaintiffs' prospective at this point, we neither want nor need any witnesses in California. Transfer is not proper if the result is to shift the inconvenience from one party to another. Kimball v. Schwartz, 580 F. Supp. 582, 588 (D.C. Pa. 1984); Ammon v. Kaplow, 468 F. Supp. 1304 (D.C. Kan. 1979); Dupre v. Spanier Marine Corp., 810 F. Supp. 823, 826 (D.C. Tex. 1993). Plaintiffs' logistical problem is easier to overcome in Galveston, Texas. The Defendant's logistical problem is not affected either way.

#### IV.

#### **THE BURDEN IS ON THE U.S.A.**

The burden is on the Defendant U.S. A. to establish why there should be a transfer of forum. Elliott v. Carnival Cruise Lines, Supra at 559. It is not enough that the Defendant prefers another forum, Meineke Muffler Shops, Inc., v. Feldman, 480 F. Supp. 1307 (D.C. Tex. 1979) nor is it enough to merely show the claim arose elsewhere. Jumara v. State Farm Inc., Co., 55 F. 3<sup>rd</sup> 873, 879 (3<sup>rd</sup> Cir. 1995); Plum Tree, Inc., v. Stockment, 488 F. 2d 754 (3<sup>rd</sup> Cir. 1973); Virginia Electric & Power Co. v. Sun Shipbuilding Co., 389 F. Supp. 568 (D.C. Va. 1975).

In this case, there is simply a bold faced allegation that it would be more convenient to move the case to California. As shown above this is simply not so. In fact, it may not be

more convenient to transfer the case without some showing of why (names and addresses of witnesses, experts, parties, etc.) it is more convenient. Unless it is obvious and necessary, the Plaintiffs' choice does not get disturbed.

The liability issue is the only reason to transfer. Without some list of experts, critical witnesses, damage witnesses, etc., the location the Defendant seeks may be wholly inconvenient. Even if some witnesses are in California, it will still not out-weight Plaintiffs' choice as set out above. As in Schindelheim v. Braniff Airways, Inc., 202 F. Supp. 313 (D.C. N.Y.), the damage issue many times out weighs the liability issue.

**PRAYER**

It is apparent that Defendant has no real basis to request a transfer other than to push the case to a less convenient place for the Plaintiffs. The case belongs in Galveston, Texas and the Motion to Transfer Venue should be denied.

Respectfully submitted,

**MIRANDA & BOYAKI**  
Attorneys at Law  
4621 Pershing Drive  
El Paso, Texas 79903  
Tel.: (915) 566-8688  
Fax : (915) 566-5906

By: /s/ Walter L. Boyaki  
**WALTER L. BOYAKI**  
Attorney for Plaintiff  
State Bar No. 02759500

/s/ Heriberto Ramos

**HERIBERTO RAMOS**

Ramos & Associates

917 Franklin, Suite 300

Houston, Texas 77002

State Bar No. 24033102

**CERTIFICATE OF SERVICE**

I, **WALTER L. BOYAKI**, do hereby certify that a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF System which will transmit notification of such filing to **JOHN S. LUCE, JR.**, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 14271, Washington, D.C. 20044-4271, on this 14<sup>th</sup> day of March, 2007.

/s/ Walter L. Boyaki

**WALTER L. BOYAKI**

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NO. G-07-003

# AFFIDAVIT

STATE OF TEXAS

COUNTY OF EL PASO

$$\begin{array}{c} ) ( \\ ) ( \\ ) ( \end{array}$$

**BEFORE ME**, the undersigned authority, on this day personally appeared **WALTER L.**

BOYAKI who after being by me first duly sworn, states the following:

“My name is WALTER L. BOYAKI. I am of sound mind, over the age of 18 years and fully qualified to make this affidavit. I am the attorney of record for Plaintiffs. I have personal knowledge of the facts contained herein. Attached as Exhibits to Plaintiffs’ Opposition to Defendant U.S.A.’s Motion to Transfer Venue, or in the alternative, for Summary Judgment are the following:

**"Exhibit "A" represents a true and correct copy of letters.**

**"Exhibit B" represents a true and correct copy of U.S.S. McClusky's Ship Information.**

**"Exhibit "C" represents a true and correct copy of airline schedule.**

Affiant says nothing further."

/s/ Walter L. Boyaki  
**WALTER L. BOYAKI**

**SUBSCRIBED AND SWORN TO BEFORE ME** by the said **WALTER L. BOYAKI**  
this 14<sup>th</sup> day of March, 2007.

/s/ Leticia Leal  
Notary Public in and for the  
State of Texas

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#### IV.

#### **THE BURDEN IS ON THE U.S.A.**

The burden is on the Defendant U.S. A. to establish why there should be a transfer of forum. Elliott v. Carnival Cruise Lines, Supra at 559. It is not enough that the Defendant prefers another forum, Meineke Muffler Shops, Inc., v. Feldman, 480 F. Supp. 1307 (D.C. Tex. 1979) nor is it enough to merely show the claim arose elsewhere. Jumara v. State Farm Inc., Co., 55 F. 3<sup>rd</sup> 873, 879 (3<sup>rd</sup> Cir. 1995); Plum Tree, Inc., v. Stockment, 488 F. 2d 754 (3<sup>rd</sup> Cir. 1973); Virginia Electric & Power Co. v. Sun Shipbuilding Co., 389 F. Supp. 568 (D.C. Va. 1975).

In this case, there is simply a bold faced allegation that it would be more convenient to move the case to California. As shown above this is simply not so. In fact, it may not be

more convenient to transfer the case without some showing of why (names and addresses of witnesses, experts, parties, etc.) it is more convenient. Unless it is obvious and necessary, the Plaintiffs' choice does not get disturbed.

The liability issue is the only reason to transfer. Without some list of experts, critical witnesses, damage witnesses, etc., the location the Defendant seeks may be wholly inconvenient. Even if some witnesses are in California, it will still not out-weight Plaintiffs' choice as set out above. As in Schindelheim v. Braniff Airways, Inc., 202 F. Supp. 313 (D.C. N.Y.), the damage issue many times out weighs the liability issue.

**PRAYER**

It is apparent that Defendant has no real basis to request a transfer other than to push the case to a less convenient place for the Plaintiffs. The case belongs in Galveston, Texas and the Motion to Transfer Venue should be denied.

Respectfully submitted,

**MIRANDA & BOYAKI**  
Attorneys at Law  
4621 Pershing Drive  
El Paso, Texas 79903  
Tel.: (915) 566-8688  
Fax : (915) 566-5906

By: /s/ Walter L. Boyaki  
**WALTER L. BOYAKI**  
Attorney for Plaintiff  
State Bar No. 02759500

/s/ Heriberto Ramos

**HERIBERTO RAMOS**

Ramos & Associates

917 Franklin, Suite 300

Houston, Texas 77002

State Bar No. 24033102

**CERTIFICATE OF SERVICE**

I, **WALTER L. BOYAKI**, do hereby certify that a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF System which will transmit notification of such filing to **JOHN S. LUCE, JR.**, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 14271, Washington, D.C. 20044-4271, on this 14<sup>th</sup> day of March, 2007.

/s/ Walter L. Boyaki

**WALTER L. BOYAKI**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, ET AL,	)(	
	)(	
Plaintiffs,	)(	
	)(	
v.	)(	NO. G-07-003
	)(	
UNITED STATES OF AMERICA,	)(	
	)(	
Defendant.	)(	

**AFFIDAVIT**

STATE OF TEXAS	)(
	)(
COUNTY OF EL PASO	)(

**BEFORE ME**, the undersigned authority, on this day personally appeared WALTER L.

BOYAKI who after being by me first duly sworn, states the following:

“My name is WALTER L. BOYAKI. I am of sound mind, over the age of 18 years and fully qualified to make this affidavit. I am the attorney of record for Plaintiffs. I have personal knowledge of the facts contained herein. Attached as Exhibits to Plaintiffs’ Opposition to Defendant U.S.A.’s Motion to Transfer Venue, or in the alternative, for Summary Judgment are the following:

“Exhibit “A” represents a true and correct copy of letters.

“Exhibit “B” represents a true and correct copy of U.S.S. McClusky’s Ship Information.

“Exhibit “C” represents a true and correct copy of airline schedule.

Affiant says nothing further.”

/s/ Walter L. Boyaki  
**WALTER L. BOYAKI**

**SUBSCRIBED AND SWORN TO BEFORE ME** by the said WALTER L. BOYAKI  
this 14<sup>th</sup> day of March, 2007.

/s/ Leticia Leal  
Notary Public in and for the  
State of Texas



August 21, 2006

Litigation Branch  
U.S. Coast Guard Claims  
Maintenance & Logistics Command Pacific  
Bldg. 54C, Coast Guard Island  
Alameda, CA 94501

Attn: LT. Commander Owen

RE: Claim of Ecuadorian Fishing Boat Justin and Crew v. USS McCluskey  
Acc #06-084

Dear LT. Commander Owen:

We were given your name as the officer handling this case. If this is incorrect, please pass this letter to the appropriate counsel.

We are getting ready to file this case in U.S. District Court. I am, however, in need of some information.

Would you be so kind to acknowledge receipt of the claim, let me know if you need anything from us (some of this incident is on video tape) and give me a point of contact.

Thank you for your attention.

Sincerely,

WALTER L. BOYAKI

WLB:ll

EXHIBIT A

September 11, 2006

Mr. G.D. Owens  
Chief, Claims  
Pacific JAG Office  
Coast Guard Island, Bldg. 54-A  
Alameda, CA 94501-5100

RE: Ecuadorian claims

Dear Mr. Owen:

At hand is your letter of September 1, 2006.

It would be most helpful if you would forward me the information in your file as how this happened and who is responsible.

As I am sure you know, we have letters from the U.S. Coast Guard which in effect accepts liability and asks for our damages. Do you have those letters? We will be happy to send them.

Our damages are set out in the claims. They are fairly simple. They lost a boat load of fish, they were unable to get back out for three months and our government was kind enough to falsely imprison and illegally search these innocent people for 9 days.

I believe under Adams v. United States, 615 F. 2d 284 (5<sup>th</sup> Cir. 1980), we have provided your agency with everything we need to. We will file in U.S. District Court shortly as soon as our six months are up (although I do not think the waiting period is required in this case).

It would be helpful if I had more or for that matter any information from your agency. Since my experience with the Navy and the Coast Guard regarding claims is totally negative, why don't you surprise me and make an effort to settle the claim. We will even escort you to Ecuador. It is a beautiful country, and these claimants are very nice people. I am sure they will be most cooperative.

I await your response, if any.

Sincerely,

WALTER L. BOYAKI

WLB:ll

EXHIBIT A

October 5, 2006

Mr. G.D. Owen  
Chief, Claims and Litigation Branch  
Pacific JAG Office  
U.S. Coast Guard Claims  
Alameda, CA 94501

RE: Ecuadorian Claims

Dear Mr. Owen:

It appears from your last letter that you have no information in this case.

As such, I will file it in Galveston, Texas next month. It might be helpful if we knew; 1) why the personnel of the U.S.S. McClusky boarded and seized our ship; and 2) is it more convenient to file this case in California or Texas?

For your information, attached is a letter from the Coast Guard through the U.S. Embassy offering to pay damages.

It would seem to me that the way to handle this claim is to provide the claimants with some necessary information and let us respond. But then again, what do I know about claims?

Send your empty file and your nonexistent litigation report to Houston. The U.S. Attorney will be like me and have to start from scratch.

Thank you for your non-cooperation.

Sincerely,

WALTER L. BOYAKI

WLB:ll

Enclosure

EXHIBIT A

## USS McCLUSKY (FFG-41) || The Ship



[Home](#)

[Ship's Info](#)

[Pictures](#)

[Welcome Aboard](#)

[Our namesake](#)

[Contacts](#)

**"Fightin' 41"**



<http://www.mcclusky.navy.mil/shipinfo.htm>

EXB

### Commanding Officers

Dec 83-Jan 86	CDR Chapman	Apr 92-Jan 94	CDR Christenson	Mar 99-Nov 00
Jan 86-Feb 88	CDR Waterman	Jan 94-Jan 96	CDR Haflich	Nov 00-Jul 02
Feb 88-Apr 90	CDR Frothingham	Jan 96-Sep 97	CDR Parriott	Jul 02-May 04
Apr 90-Apr 92	CDR Turner	Sep 97-Mar 99	CDR Awai	May 04-Apr 06
			CDR Schultz	Apr 06-Present

Proud to be part of Commander Destroyer Squadron ONE (COMDESRON ONE)

EX B-1

---

USS McCLUSKY (FFG-41) :: Executive Officer

---



---

[Home](#)

[Ship's Info](#)

[Pictures](#)

[Welcome Aboard](#)

[Our namesake](#)

[Contacts](#)

[New](#)

---

**Lieutenant Commander James E. Brown**

**Executive Officer - USS McClusky**

<http://www.mcclusky.navy.mil/xo%20page.htm>

3

Ex B-2



Lieutenant Commander James Brown was raised in Las Vegas, Nevada. He attended the United States Naval Academy, where he earned a Bachelor of Science degree in Chemistry, and was commissioned in May 1993.

LCDR Brown's first sea tour was onboard USS CHANCELLORSVILLE (CG 62) where he served as the OI Division Officer and Strike Officer. He then entered the Nuclear Power Pipeline, and arrived onboard USS JOHN C. STENNIS (CVN 74). There he served as the Chemistry and Radiological Controls Assistant during STENNIS' maiden around-the-world deployment.

Upon completion of his Division Officer tours, LCDR Brown transferred to Expeditionary Warfare Training Group, Pacific, where he taught Naval Gunfire and was a Range Safety Officer for live fire

EX B-3

exercises on San Clemente Island. LCDR Brown then completed Department Head school and reported to USS CURTS (FFG 38) as the Operations Officer and then transferred to USS NIMITZ (CVN 68) as the Reactor Electrical Assistant.

LCDR Brown was then assigned to the Nuclear Power Mobile Training Team for Commander, Naval Air Forces Pacific.

His personal awards include the Navy and Marine Corps Commendation Medal (four gold stars) and the Navy and Marine Corps Achievement Medal.

LCDR Brown assumed duties as Executive Officer of USS MCCLUSKY (FFG 41) on 14 July 2006.

---

Commanding Officer | Command Master Chief

<http://www.mcclusky.navy.mil/xo%20page.htm>

EXB-4



Build your own trip - UIO to IAH

Page 1 of 3



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## Quito, Ecuador (UIO) to Houston, TX (IAH)

Change your search:

Departure airport:  
UIO (Quito)

Destination airport:  
IAH (Houston)

Departing: (mm/dd/yy)  
4/19/2007

Anytime

Returning: (mm/dd/yy)  
4/23/2007

Anytime

Airline: [More Info](#)  
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Class  
Economy / Coach

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☐ Refundable flights only



All Results



Copa



Continental



American Airlines



Delta

Nonstop

from \$802  
see below

---

from \$802

---

---

1 stop

from \$740  
see below

---

from \$741

from \$740

---

2+ stops

from \$640  
see below

from \$640

from \$640

from \$816

from \$827

**Note:** The prices shown below are for the flight only; they are e-ticket prices and include all flight taxes and itinerary requires paper tickets there will be an additional charge

## 1 Choose a departing flight or view complete roundtrips

Sort by: ☒ Price ☐ Duration ☐ Departure time ☐ Arrival time

from **\$640 Roundtrip**  
7:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 7:36 pm

Thu 19-Apr  
Duration: 11hr  
56mn



**Copa 210 / 300**  
**Continental 491**  
Connect in Panama City  
Intl., Miami (MIA)

[Choose this](#)[Preview seat availability](#)

from **\$740 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 5:10 pm

Thu 19-Apr  
Duration: 10hr  
30mn



**American Airlines 5**  
Connect in Miami (MIA)

[Choose this](#)[Preview seat availability](#)

from **\$741 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 4:30 pm

Thu 19-Apr  
Duration: 9hr 50mn



**American Airlines 5**  
**Continental 391**  
Connect in Miami (MIA)

[Choose this](#)[Preview seat availability](#)

from **\$802 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 12:08 pm

Thu 19-Apr  
Duration: 5hr 28mn



**Continental 654**  
Nonstop flight

[Choose this](#)[Preview seat availability](#)

- Indicates flight is operated by another airline. Move your mouse over the icon for details.

Change travelers  
1 Adult  
Change travelers

EXC

Build your own trip - UIO to IAH

Page 2 of 3

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## QUESTIONS?

- Can I use a credit card with a billing address outside the U.S.?

✈ from **\$816 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 5:47 pm

Preview seat availability

Thu 19-Apr  
Duration: 11hr 7mn



American Airlines 9  
Continental 2943  
Connect in Miami (MIA).  
(MCO)

➔ Choose this

✈ from **\$816 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 7:13 pm

Preview seat availability

Thu 19-Apr  
Duration: 12hr 33mn



American Airlines 9  
Continental 1687  
Connect in Miami (MIA).  
(MCO)

➔ Choose this

✈ from **\$827 Roundtrip**  
9:55 pm Depart Quito (UIO)  
Arrive Houston (IAH) 10:07 am +1 day

Preview seat availability

Thu 19-Apr  
Duration: 12hr 12mn



Delta 195 / 846  
Connect in Atlanta (Hart)  
Total stops: 2

➔ Choose this

✈ from **\$860 Roundtrip**  
8:25 am Depart Quito (UIO)  
Arrive Houston (IAH) 7:13 pm

Preview seat availability

Thu 19-Apr  
Duration: 10hr 48mn



American Airlines 9  
Delta 6126  
Continental 1687  
Connect in Miami (MIA).  
(MCO)

➔ Choose this

✈ from **\$962 Roundtrip**  
6:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 7:13 pm

Preview seat availability

Thu 19-Apr  
Duration: 12hr 33mn



American Airlines 9  
Continental 9305  
Connect in Miami (MIA).  
(MCO)

➔ Choose this

✈ from **\$1979 Roundtrip**  
7:40 am Depart Quito (UIO)  
Arrive Houston (IAH) 7:26 pm

Preview seat availability

Thu 19-Apr  
Duration: 11hr 45mn



Copa 210  
Delta 8058  
Connect in Mexico City  
Total stops: 2

➔ Choose this

EXC-1

Build your own trip - UIO to SAN

Page 1 of 3



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Start search over

Quito, Ecuador (UIO) to San Diego, CA (SAN)

Change your search

Departure airport:  
UIO (Quito)

Destination airport:  
SAN (San Diego)

Departing: (mm/dd/yy)  
4/19/2007  
Anytime

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4/23/2007  
Anytime

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1 Adult  
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Nonstop

1 stop

2+ stops

from \$864  
see below

from \$801  
see below

from \$864

from \$801

from \$801

from \$864

from \$1123

**Note:** The prices shown below are for the flight only; they are e-ticket prices and include all flight taxes and fees. Itinerary requires paper tickets there will be an additional charge. These results cover a metro area with several airports. Review your choices carefully.

1 Choose a departing flight to view complete roundtrips

Sort by: ☒ Price ☐ Duration ☐ Departure time ☐ Arrival time

from \$801 Roundtrip

6:40 am Depart Quito (UIO)  
Arrive Carlsbad (CLD) 4:40 pm

Thu 19-Apr  
Duration: 12hr 0mn



Continental 654 / 11  
United 75750  
Connect in Houston (IAH)  
Angeles (LAX)

Choose this

from \$864 Roundtrip

6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 3:43 pm

Thu 19-Apr  
Duration: 11hr 3mn



Continental 654 / 41  
Connect in Houston (IAH)

Choose this

from \$864 Roundtrip

7:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 7:26 pm

Thu 19-Apr  
Duration: 13hr 46mn



Copa 210  
Continental 889 / 11  
Connect in Panama City Intl. (Houston (IAH))

Choose this

from \$864 Roundtrip

7:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 8:36 pm

Thu 19-Apr  
Duration: 14hr 56mn



Copa 210  
Continental 889 / 41  
Connect in Panama City Intl. (Houston (IAH))

EX C-2

## Build your own trip - UIO to SAN

Page 2 of 3

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CHASE

Preview seat availability

Choose this

from **\$1123** Roundtrip  
8:25 am Depart Quito (UIO)  
Arrive San Diego (SAN) 7:26 pm

Thu 19-Apr  
Duration: 13hr 1mn



**American Airlines** 9  
**Continental 1689**  
Connect in Miami (MIA)  
(IAH)

Choose this

Preview seat availability

from **\$1123** Roundtrip  
8:25 am Depart Quito (UIO)  
Arrive San Diego (SAN) 8:36 pm

Thu 19-Apr  
Duration: 14hr  
11mn



**American Airlines** 9  
**Continental 435**  
Connect in Miami (MIA)  
(IAH)

Choose this

Preview seat availability

from **\$1123** Roundtrip  
6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 7:26 pm

Thu 19-Apr  
Duration: 14hr  
46mn



**American Airlines** 9  
**Continental 1689**  
Connect in Miami (MIA)  
(IAH)

Choose this

Preview seat availability

from **\$1123** Roundtrip  
6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 8:36 pm

Thu 19-Apr  
Duration: 15hr  
56mn



**American Airlines** 9  
**Continental 391 / 4**  
Connect in Miami (MIA)  
(IAH)

Choose this

Preview seat availability

from **\$1196** Roundtrip  
6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 8:36 pm

Thu 19-Apr  
Duration: 15hr  
56mn



**American Airlines** 9  
**Continental 435**  
Connect in Miami (MIA)  
(IAH)

Choose this

Preview seat availability

## FLIGHT HINTS

For your convenience, we've added estimated price hints to some of these flights. Prices may vary and will be verified prior to purchase.

from **\$1242** Roundtrip  
6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 4:40 pm

Thu 19-Apr  
Duration: 12hr 0mn



**Continental 654 / 2**  
**American Airlines 1**  
Connect in Houston (IAH)  
(Dallas-Fort Worth Intl.)

Choose this

Preview seat availability

## FAQS

Can I use a credit card with a billing address outside the U.S.?

from **\$1242** Roundtrip  
6:40 am Depart Quito (UIO)  
Arrive San Diego (SAN) 5:15 pm

Thu 19-Apr  
Duration: 12hr



**Continental 654 / 2**

EX C-3

Build your own trip - UIO to SAN

Page 3 of 3

☐ Is it safe to buy  
online?

35min



American Airlines 1

Connect in Houston (IAH)  
(Dallas-Fort Worth Intl.)

Choose this

☐ Need help with this  
page?

Preview seat availability

☐ Other FAQs from **\$1369 Roundtrip****6:40 am** Depart Quito (UIO)**Arrive San Diego (SAN) 7:26 pm**

Thu 19-Apr

Duration: 14hr

46min



American Airlines 9

Continental 391 / 11

Connect in Miami (MIA).  
(IAH)

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Preview seat availability

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Exc-4

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

V.

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**UNITED STATES' LEAVE TO FILE REPLY**

The United States of America moves to seek leave of Court to file the attached  
Reply to Plaintiffs' Opposition to United States' Motion to Transfer Venue.

**Dated: March 20, 2007**

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.  
United States Attorney

DANIEL HU  
Assistant United States Attorney

STEPHEN CAMPBELL  
Trial Attorney  
Torts Branch, Civil Division

s/ JOHN S. LUCE Jr.

JOHN S. LUCE Jr.

Attorney In Charge

New York Bar # 3934213

Trial Attorney

Torts Branch, Civil Division

U. S. Department of Justice

P.O. Box 14271

Washington, D.C. 20044-4271

Telephone: (202) 616-4035

Facsimile: (202) 616-4159

E-Mail: john.luce@usdoj.gov

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 20 2007, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to the following:

Walter L. Boyaki

I further certify that I mailed the foregoing document and notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Heriberto Ramos  
Ramos & Associates  
917 Franklin , Suite 300  
Houston, Texas 77002

s/ JOHN S. LUCE Jr.  
JOHN S. LUCE Jr.  
Attorney In Charge  
New York Bar # 3934213  
Trial Attorney  
Torts Branch, Civil Division  
U. S. Department of Justice  
P.O. Box 14271  
Washington, D.C. 20044-4271  
Telephone: (202) 616-4035  
Facsimile: (202) 616-4159  
E-Mail: john.luce@usdoj.gov



**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

**V.**

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**REPLY TO PLAINTIFFS' OPPOSITION TO  
UNITED STATES' MOTION TO TRANSFER VENUE**

The United States of America has moved to transfer venue pursuant to Federal Rules of Civil Procedure 12(b)(3) and the venue requirements of the Public Vessels Act, 46 U.S.C. § 31104 asserting that transfer of this admiralty and maritime action is warranted as a matter of law because the public vessel in issue – USS MCCLUSKY – was in her homeport of San Diego, California on the date the complaint was filed. Plaintiffs have opposed the motion and the Government now replies.

Plaintiffs’ arguments regarding transfer of venue wholly fail to address the venue provisions of the Public Vessels Act (“PVA”), as set forth in the United States motion, which require venue in the Southern District of California. Instead, Plaintiffs engage in an analysis of whether transfer of venue is proper under the “convenience of the parties”

provision of 28 U.S.C. § 1404. This is not the proper analysis.<sup>1</sup> Because venue is not proper in this Honorable Court, transfer of venue is warranted under 28 U.S.C. § 1406. *See, e.g.*, 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3817 n. 25 (“[46 U.S.C. § 31104] relates to venue, not jurisdiction, and the remedy for noncompliance is transfer, not dismissal. *Roque v. U.S.*, D.C. Puerto Rico 1964, 227 F.Supp. 178.”)

Plaintiffs’ alternative reference to the venue provisions of the Suits in Admiralty Act (“SAA”) is misplaced. The provisions of PVA take precedence over the SAA. However, even if the SAA venue provisions were applicable, the only proper venue would remain in the Southern District of California. The venue provisions of the SAA provide: “A civil action under this chapter shall be brought in the district court of the United States for the district in which--(1) any plaintiff resides or has its principal place of business; or (2) the vessel or cargo is found.” 46 U.S.C. § 30906. Because the Plaintiffs reside in Ecuador, the only proper venue under the SAA is where the vessel is found. In this case, that is the Southern District of California.

The Plaintiffs’ arguments of equitable and judicial estoppel fail as a matter of law. The Supreme Court has consistently held that the “Government may not be estopped on

---

<sup>1</sup> Even as to this incorrect standard, it is worth noting that Plaintiffs do not assert any connection to Galveston; Plaintiffs reside in Ecuador and Plaintiffs’ counsel has his office in El Paso. Plaintiffs merely assert that there is a direct flight from Ecuador to Houston.

the same terms as any other litigant.” *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). The Supreme Court recognizes the Government’s compelling arguments, based upon sovereign immunity and separation of powers, in support of a bright line rule foreclosing estoppel against the Government. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 23 (1990). The Court has, however, left open the possibility of estoppel based on some type of “affirmative misconduct.” *Id.* at 421 - 22. Therefore, to establish equitable estoppel against the Government Plaintiffs must establish the elements of equitable estoppel and some type of affirmative misconduct.

Equitable estoppel requires “a definitive misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does act. . . .” *Heckler*, 467 at 59 (quoting Restatement (Second) of Torts § 984(1) (1979)). In the instant case, however, Plaintiffs assert only that an unidentified person either did not answer a phone or, when asked, would not provide the operational schedule of a United States Navy warship. Based on Plaintiffs own assertion, they have failed to establish the elements of estoppel.

Plaintiffs also fail to establish a claim of judicial estoppel. The doctrine of judicial estoppel is set out in *New Hampshire v. Maine*: ““where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be

to the prejudice of the party who acquiesced in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This is the first instance in which the United States has taken a position regarding venue, therefore judicial estoppel simply does not apply.

Prior to filing the present suit, Plaintiffs filed administrative claims with the Coast Guard. Plaintiffs assert that filing claims with the Coast Guard was a fruitless effort and that “No one responded to any inquiry, phone call, letter.” (Pls.’ Opp’n to U.S. Mot. to Transfer Venue ¶ 5 (emphasis in original).) In support of this assertion, Plaintiffs’ attached an Exhibit containing three letters written to the Coast Guard. Two of the letters acknowledge receipt of letters from the Coast Guard; thus plainly contradicting the assertion that no one responded. For purposes of completeness the two letters from the Coast Guard are attached hereto as Exhibit A. Both simply request that Plaintiffs supply more evidence of their losses to support the claims. Neither is misleading, nor do they mention the subject of proper venue of an action against the United States.

For the foregoing reasons, the United States’ motion to transfer venue should be granted.

Dated: March 20, 2007

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

DONALD J. DeGABRIELLE, JR.

**United States Attorney****DANIEL HU****Assistant United States Attorney****STEPHEN CAMPBELL****Trial Attorney****Torts Branch, Civil Division**s/ JOHN S. LUCE Jr.**JOHN S. LUCE Jr.****Attorney In Charge****New York Bar # 3934213****Trial Attorney****Torts Branch, Civil Division****U. S. Department of Justice****P.O. Box 14271****Washington, D.C. 20044-4271****Telephone: (202) 616-4035****Facsimile: (202) 616-4159****E-Mail: john.luce@usdoj.gov**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 20, 2007, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to the following:

Walter L. Boyaki

I further certify that I mailed the foregoing document and notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Heriberto Ramos  
Ramos & Associates  
917 Franklin , Suite 300  
Houston, Texas 77002

s/ JOHN S. LUCE Jr.

JOHN S. LUCE Jr.  
Attorney In Charge  
New York Bar # 3934213  
Trial Attorney  
Torts Branch, Civil Division  
U. S. Department of Justice  
P.O. Box 14271  
Washington, D.C. 20044-4271  
Telephone: (202) 616-4035  
Facsimile: (202) 616-4159  
E-Mail: john.luce@usdoj.gov

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendant

Civil Action G-07-003

**AFFIDAVIT OF GEOFFREY OWEN**

I, Geoffrey D. Owen, make the following statement under oath:

1. I am a Lieutenant Commander in the United States Coast Guard and am the Branch Chief of the U.S. Coast Guard Maintenance and Logistics Command, Pacific Claims and Litigation Branch.
2. A true and accurate copy of the letters I sent to Mr. Walter Boyaki on September 1, 2006 and September 13, 2006 are attached hereto as Exhibit A.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on March 16, 2007.



GEOFFREY D. OWEN

U.S. Department of  
Homeland Security

United States  
Coast Guard



Commander  
Maintenance & Logistics Command Pacific  
Pacific JAG Office

Coast Guard Island, Bldg. 54-A  
Alameda, CA 94501-5100  
Staff Symbol: (lc)  
Phone: (510)437-3364  
Fax: (510)437-3337

COPY

5890  
3306LC0115  
September 13, 2006

Miranda & Boyaki  
Attn: Mr. Walter Boyaki  
4621 Pershing Drive  
El Paso, Texas 79903

Dear Mr. Boyaki:

Regarding your letter of September 11, 2006, the only materials contained in this office's file are the twenty-six Standard Form 95s for the individual claimants you represent and copies of your correspondence with the United States Navy and this office. Our investigation into this matter is ongoing.

As I noted in my letter of September 1, 2006, I am unable to evaluate these claims because no evidence was presented to support the amounts claimed for property damage/loss or personal injury. I direct your attention to 33 C.F.R. Part 25 and the sections that discuss evidence required to be submitted with a claim, specifically:

**§ 25.115 Evidence supporting a claim.**

The claimant shall present independent evidence to support a claim. This evidence may include, if available, statements of witnesses, accident or casualty reports, photographs and drawings.

**§ 25.117 Proof of amount claimed for personal injury or death.**

The following evidence must be presented when appropriate:

- (a) Itemized medical, hospital, and burial bills.
- (b) A written report by the attending physician including:
  - (1) The nature and extent of the injury and the treatment,
  - (2) The necessity and reasonableness of the various medical expenses incurred,
  - (3) Duration of time injuries prevented or limited employment,
  - (4) Past, present, and future limitations on employment,
  - (5) Duration and extent of pain and suffering and of any disability or physical disfigurement,
  - (6) A current prognosis,
  - (7) Any anticipated medical expenses, and
  - (8) Any past medical history of the claimant relevant to the particular injury alleged.

Note: An examination by an independent medical facility or physician may be required to provide independent medical evidence against which to evaluate the written report of the claimant's physician.

EXHIBIT A, 2 OF 4



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September 13, 2006

The settlement authority determines the need for this examination, makes mutually convenient arrangements for such an examination, and bears the costs thereof.

(c) All hospital records or other medical documents from either this injury or any relevant past injury.

(d) If the claimant is employed, a written statement by the claimant's employer certifying the claimant's:

(1) Age,

(2) Occupation,

(3) Hours of employment,

(4) Hourly rate of pay or weekly salary,

(5) Time lost from work as a result of the incident, and

(6) Claimant's actual period of employment, full-time or part-time, and any effect of the injury upon such employment to support claims for lost earnings.

(e) If the claimant is self-employed, written statements, or other evidence showing:

(1) The amount of earnings actually lost, and

(2) The Federal tax return if filed for the three previous years.

(f) If the claim arises out of injuries to a person providing services to the claimant, statement of the cost necessarily incurred to replace the services to which claimant is entitled under law.

**§ 25.119 Proof of amount claimed for loss of, or damage to, property.**

The following evidence must be presented when appropriate:

(a) For each particular lost item, evidence of its value such as a bill of sale and a written appraisal, or two written appraisals, from separate disinterested dealers or brokers, market quotations, commercial catalogs, or other evidence of the price at which like property can be obtained in the community. The settlement authority may waive these requirements when circumstances warrant. The cost of any appraisal may be included as an element of damage if not deductible from any bill submitted to claimant.

(b) For each particular damaged item which can be economically repaired, evidence of cost of repairs such as a receipted bill and one estimate, or two estimates, from separate disinterested repairmen. The settlement authority may waive these requirements when circumstances warrant. The cost of any estimate may be included as an element of damage if not deductible from any repair bill submitted to claimant.

(c) For any claim which may result in payment in excess of \$20,000.00, a survey or appraisal shall be performed as soon as practicable after the damage accrues, and, unless waived in writing, shall be performed jointly with a government representative.

(d) If the item is so severely damaged that it cannot be economically repaired or used, it shall be treated as a lost item.

(e) If a claim includes loss of earnings or use during repairs to the damaged property, the following must also be furnished and supported by competent evidence:

(1) The date the property was damaged;

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September 13, 2006

- (2) The name and location of the repair facility;
- (3) The beginning and ending dates of repairs and an explanation of any delay between the date of damage and the beginning date;
- (4) A complete description of all repairs performed, segregating any work performed for the owner's account and not attributable to the incident involved, and the costs thereof;
- (5) The date and place the property was returned to service after completion of repairs, and an explanation, if applicable, of any delay;
- (6) Whether or not a substitute for the damaged property was available. If a substitute was used by the claimant during the time of repair, an explanation of the necessity of using the substitute, how it was used, and for how long, and the costs involved. Any costs incurred that would have been similarly incurred by the claimant in using the damaged property must be identified;
- (7) Whether or not during the course of undergoing repairs the property would have been used, and an explanation submitted showing the identity of the person who offered that use, the terms of the offer, time of prospective service, and rate of compensation; and
- (8) If at the time of damage the property was under charter or hire, or was otherwise employed, or would have been employed, the claimant shall submit a statement of operating expenses that were, or would have been, incurred. This statement shall include wages and all bonuses which would have been paid, the value of fuel and the value of consumable stores, separately stated, which would have been consumed, and all other costs of operation which would have been incurred including, but not limited to, license and parking fees, personnel expenses, harbor fees, wharfage, dockage, shedding, stevedoring, towage, pilotage, inspection, tolls, lockage, anchorage and moorage, grain elevation, storage, and customs fees.
- (f) For each item which is lost, actual or constructive, proof of ownership.

Again, as I have previously noted, this is not a denial. Should this information be received, we shall proceed with consideration of these claims. Finally, this letter should in no way be interpreted as waiving any rights of the United States or other legal requirements including any applicable statute of limitations.

Sincerely,



G. D. OWEN

Chief, Claims and Litigation Branch

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, ET AL,	)(	
	)(	
Plaintiffs,	)(	
	)(	
v.	)(	NO. 3:07-CV-00003
	)(	
UNITED STATES OF AMERICA,	)(	ADMIRALTY
	)(	
Defendant.	)(	

**JOINT DISCOVERY/CASE MANAGEMENT PLAN**

Pursuant to Rule 26(f), Federal Rules of Civil Procedure, the parties file this Joint

Discovery/Case Management Plan as follows:

1. State where and when the meeting of the parties required by Rule 26(f) was held, and identify the counsel who attended for each party.

March 20, 2007, by phone. Walter L. Boyaki for Plaintiff, John S. Luce, Jr., for Defendant U.S.A.

2. List the cases related to this one that are pending in any state or federal court, with the case number and court.

None.

3. Briefly describe what this case is about.

Alleged false arrest and imprisonment of Plaintiffs who are Ecuadorian fishermen by U.S. Naval and Coast Guard personnel. Alleged wrongful seizure of the Plaintiffs Ecuadorian fishing vessel, willful destruction of private property, violation of civil rights and violation of international law on the high sea.

4. Specify the allegation of federal jurisdiction.

FTCA 28 U.S.C. §1346(b) and 2661. Admiralty under 42 U.S.C. § 741, et. seq. and Public Vessels Act, 46 U.S.C. §781, et. seq.

5. Name the parties who disagree and the reasons.

Defendant, United States, disagrees for the following reasons. Plaintiffs allege an improper boarding and seizure by a United States Navy vessel on the high seas; therefore this action comes within the exclusive admiralty jurisdiction of this Court. This Court has jurisdiction of Plaintiff's Complaint and action against Defendant, United States of America, a sovereign nation, if at all, solely under the provisions of the Public Vessels Act, 46 U.S.C. §§ 31101 *et seq.*, incorporating the consistent provisions of the Suits in Admiralty Act, 46 U.S.C. §§ 30901 *et seq.*, and not otherwise.

The United States' Answer also sets forth affirmative defenses based on lack of subject matter jurisdiction.

6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.

None known at this time.

7. List anticipated interventions.

None.

8. Describe class-action issues.

None.

9. State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures.

Plaintiff will make his initial disclosure on or before April 15, 2007. Defendant U.S.A. will make their initial disclosure on or before April 15, 2007.

10. Describe the proposed agreed discovery plan, including:

A. Responses to all the matters raised in Rule 26(f).

Prompt settlement is not feasible without depositions of facts witnesses and the parties' respective experts. The initial disclosures shall be made by April 15, 2007. No changes in the timing or form of discovery is needed at this time, except since there are non-citizen witnesses, additional time

may be required to comply with international protocol and procedure to obtain discovery.

- B. When and to whom the Plaintiff anticipates it may send interrogatories

Plaintiff anticipates sending Interrogatories to the Defendant by April 1, 2007.

- C. When and to whom the Defendant anticipates it may send interrogatories.

Defendant USA anticipates sending Interrogatories to Plaintiff by May 15, 2007.

- D. Of whom and by when the Plaintiff anticipates taking oral depositions.

Plaintiff anticipates deposing Defendant's agents including the ship's captain, the people in charge of the Coast Guard operation and some non-citizen Ecuadorian witnesses, no later than the close of discovery.

- E. Of whom and by when the Defendant anticipates taking oral depositions.

Defendant U.S.A. anticipates deposing the Plaintiffs, Plaintiffs' experts, and possibly non-citizen witnesses, no later than the close of discovery.

- F. When the Plaintiff (s) (or the party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports.

Plaintiffs by October 1, 2007

Defendant's responsive experts by November 15, 2007

- G. List expert depositions the Plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) expert report).

Plaintiffs anticipates deposing Defendant expert no later than the close of discovery.

H. List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(6) (expert report).

Defendant anticipates deposing Plaintiff's experts no later than the close of discovery.

11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.

N/A.

12. Specify the discovery beyond initial disclosures that has been undertaken to date.

None.

13. State the date the planned discovery can reasonably be completed.

February 28, 2008; except since there are non-citizen witnesses, additional time may be required to comply with international protocol and procedure to obtain discovery.

14. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.

It is premature to reasonably discuss settlement until the depositions of the parties are completed.

15. Describe what each party has done or agreed to do to bring about a prompt resolution.

Nothing can be reasonably be done to speed resolution until discovery is largely completed.

16. From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and when such a technique may be effectively used in this case.

The parties believe mediation may be suitable after discovery is largely completed.

17. Magistrate judges may now hear jury and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge.

The parties do not agree to trial before a magistrate judge.

18. State whether a jury demand has been made and if it was made on time.

No demand for a trial by jury has been made and is not appropriate in this case.

19. Specify the number of hours it will take to present the evidence in this case.

For Plaintiffs - 3 days of trial.

For Defendant - 2-3 days of trial.

20. List pending motions that could be ruled on at the initial pretrial and scheduling conference.

Defendant United States' Motion to Transfer Venue.

21. List other motions pending.

None.

22. Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference.

This action involves non-citizen witnesses, including each Plaintiff; therefore, additional time may be required to comply with international protocol and procedure to obtain discovery.

23. Certify that all parties have filed the Disclosure of Interested Persons as directed in the Order for Conference and Disclosure of Interested Person, listing the date of filing for original and any amendments.

It is so certified. Plaintiffs filed their disclosure on January 16, 2007. Defendant United States filed its disclosure on March 9, 2007.

24. List the names, bar numbers, addresses, and telephone number of all counsel.

Walter L. Boyaki  
Miranda & Boyaki  
4621 Pershing Drive  
El Paso, Texas 79903  
(915) 566-8688; Fax: (915) 566-5906

Attorney for Plaintiffs

Mr. John S. Luce, Jr.  
Trial Attorney  
U.S. Department of Justice

Attorney for Defendant U.S.A.

Aviation/Admiralty Litigation  
Torts Branch, Civil Division  
P.O. Box 14271  
Washington, DC 20044-4271  
(202) 616-4035; Fax: (202) 616-4159

/s/ Walter L. Boyaki

March 22, 2007

\_\_\_\_\_  
**WALTER L. BOYAKI**  
Attorney for Plaintiffs

\_\_\_\_\_  
Date

\_\_\_\_\_  
s/ JOHN S. LUCE Jr.  
**JOHN S. LUCE, Jr.**  
Attorney for Defendant U.S.A.

\_\_\_\_\_  
March 22, 2007  
Date



## IN THE UNITED STATES DISTRICT COURT

## FOR THE SOUTHERN DISTRICT OF TEXAS

## GALVESTON DIVISION

OSWALDO ENRIQUE TOBAR, *et al.*

§

V.

§

§ CIVIL ACTION NO. G-07-3

§

UNITED STATES OF AMERICA

§

**DOCKET CONTROL ORDER**

1. October 2, 2007 **PLAINTIFF'S EXPERTS** will be designated in accordance with Rule 26(b), FRCP by this date and reports (except medical reports which can be obtained otherwise), shall be tendered. No additional experts will be permitted to testify except for good cause shown.
2. November 9, 2007 **DEFENDANT'S EXPERTS** will be designated in accordance with Rule 26(b), FRCP by this date and reports (except I.M.E. reports which can also be obtained otherwise), shall be tendered. No additional experts will be permitted to testify except for good cause shown.
3. December 30, 2007 **DISCOVERY** should be completed by this date. Counsel may, by agreement, continue discovery beyond the deadlines, but there will be no intervention by the Court, without a showing of extreme prejudice. No trial setting will be vacated because of information acquired in post-deadline discovery.
4. January 4, 2008 **SIGNED JOINT PRE-TRIAL ORDER** (ORIGINAL AND ONE(1) COPY) WITH EXHIBIT LISTS, WHICH CONFORMS TO THE FORMAT SET FORTH IN APPENDIX B OF THE LOCAL RULES.
5. January 11, 2008 **PRE-TRIAL CONFERENCE** at 12:00 p.m., before the Magistrate Judge. Limine matters will be addressed at this conference.
6. January 14, 2008 **NON-JURY TRIAL DATE**: Counsel **MUST** be prepared for trial at 8:30 a.m., on this date before the District Court.

The pretrial order shall be filed with the office of the District Clerk in GALVESTON and should be joint, succinct, brief and concise. It should be accompanied by (1) a Witness List identifying each witness, and stating whether or not such witness is or is not a fact or expert witness, and regarding the latter, the area of expertise; and (2) an Exhibit List, specifically including vertical columns and blocks, allowing for the indication of whether any piece of evidence has been "marked", "offered", "objected to", "admitted" and "date", for each and every piece of evidence.

IT IS EXPRESSLY ORDERED THAT FAILURE TO ADHERE TO THE REQUIREMENT OF JOINT AND COMPLETE SUBMISSION WILL CONSTITUTE THE BASIS FOR SEVERE SANCTIONS, UP TO AND INCLUDING THE STRIKING OF THE PLEADINGS OF ANY PARTY NOT HERewith COMPLYING.

FAILURE TO TENDER APPROPRIATE EVIDENCE LISTS WILL RESULT IN THE OFFENDING PARTIES' PROSCRIPTION FROM OFFERING ANY EVIDENCE AT THE TRIAL IN THIS CAUSE.

If this cause is on the jury docket then the Pretrial Order shall be accompanied by an agreed, and jointly prepared, full and complete jury charge, specifically including all necessary substantial and precatory instructions specifically including the precise details of (1) the *prima facie* elements of any cause of action asserted, (2) legal definitions required by the jury, (3) items of damages, and (4) methods of calculation of damages, together with complete appropriate interrogatory forms. These will be joint, complete, and succinct. In the event that the parties, in good faith, cannot agree upon the language of the charge, the parties will, in any event, submit a single, unified charge, wherein they will set out in the charge each offering, in succession, regarding which there is disagreement, separated by the word "or", with the totality of each such disputed offering to be in emboldened type, and from which the Court can make a single selection. Accompanying the charge will be all authority, citations or related materials which the offering party relies upon, to allow the Court to have an opportunity to fully and completely consider such. **FAILURE TO COOPERATE AND TO JOINTLY SUBMIT THE FULL AND COMPLETE CHARGE, WITH INCLUDED OPTIONS, AS NECESSARY, WILL RESULT IN SEVERE SANCTIONS, UP TO AND INCLUDING THE STRIKING OF THE PLEADINGS OF ANY PARTY, AND SEVERE FINANCIAL SANCTIONS ASSESSED AGAINST ANY OFFENDING ATTORNEY.** There is absolutely no excuse for any delay in the submission of this item.

To insure full notice, each party who receives this notice shall contact all other counsel of record and/or any pro se litigants to insure receipt of notice, and as regards any counsel or pro se litigant claiming non-receipt, the contacting attorney shall forward a copy of it to said counsel or party.

### NOTICE

**FAILURE TO COMPLY WITH THIS ORDER WILL RESULT  
IN SANCTIONS PURSUANT TO FED.R.CIV.P. 16(f).**

**DONE** at Galveston, Texas, this 11<sup>th</sup> day of April, 2007.

A handwritten signature in black ink, appearing to read "Samuel B. Kent". The signature is written in a cursive, flowing style.

Samuel B. Kent  
United States District Judge